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Honorable Leonard B. Sand
United States District Court
Southern District of New York
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, New York 10007-1312

Re: David B. Newman, et al. v. Family Management Corp. et al.
(08 Civ. 11215)

Dear Judge Sand:

We represent Defendants MAXAM Capital Management LLC, Sandra Manzke, MAXAM Capital Management Limited, and MAXAM Capital GP LLC, (together, "MAXAM") in the above-captioned matter. We write to respectfully request the Court's permission to file a one page sur-reply in further support of the MAXAM's opposition to Plaintiffs' Motion to Alter or Amend the Judgment and for Leave to Amend (the "Motion"). This sur-reply is necessitated by a misstatement of the law contained in Plaintiffs' Omnibus Reply Memorandum of Law in Further Support of the Motion (the "Reply").

In their Reply, Plaintiffs assert that that "the law is clear in New York that [the MAXAM Defendants] have no standing to assert the pre-suit lack of demand defense". (Reply at 34-35). According to Plaintiffs, only the entity on which Plaintiffs failed to make demand can raise this issue.

Plaintiffs' argument misstates the law in two fundamental ways. As an initial matter, Delaware, rather than New York law, governs whether Plaintiffs' claims should be dismissed. *See e.g., Kamen v. Kemper Fin. Servs. Inc.*, 500 U.S. 90, 108-09 (1991). It is not disputed (and cannot be disputed) that under Delaware law, MAXAM has standing to assert the pre-suit demand defense. *See Kaplan v. Peat, Marwick, Mitchell & Co.*, 540

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A.2d 726, 730 (Del. 1988); *see also Rales v. Blasband*, 634 A.2d 927, 934 n.9 (Del. 1993).

But even if New York law applied, Plaintiffs statement of that law is inaccurate. Under New York law, MAXAM Defendants have standing to assert the pre-suit demand defense. *See Kalin v. Xanboo*, 526 F. Supp. 2d 329, 408 n.7 (S.D.N.Y 2007) (applying New York law and holding that a third party like MAXAM has standing to seek dismissal based on a failure to plead demand or the futility of demand).

Accordingly, MAXAM respectfully requests permission to file a sur-reply, not to exceed three pages, to address this point.

Respectfully submitted,

Carrie A. Tendler /AJM

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cc: All counsel of record (via electronic mail)

Permission granted
So ordered
[signature]
USDJ
1/26/2011

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